No. 2913.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTH AMERICAN DREDGING COMPANY OF NEVADA, a Corporation, and CITY OF RICHMOND, a Municipal Corporation,

Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Appellees.

BRIEF FOR APPELLEES

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Filed this.....day of March, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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STATEMENT OF THE CASE.

The plaintiffs in the court below, appellees here, filed their bill praying for an injunction to restrain the defendant in the court below, North American Dredging Company of Nevada, a corporation, appellant herein, from cutting a ditch or canal across their property consisting of about 500 acres of land situated in the City of Richmond, County of Contra Costa, State of California. The bill alleged that complain-

ants' testator, William Mintzer, deceased, was seized as of fee and possessed of the land at the time of his decease, and for a great many years had been in possession of the land by himself and by his predecessors in title. The bill alleged that the defendant, without right, entered upon the land, and commenced to cut a ditch or canal 80 feet in width and 8 feet below low tide for a distance of from four thousand to five thousand feet across the land of testator, and was depositing the dirt or soil taken from the land upon the land of the Standard Oil Company, and that the acts of defendant constituted a wilful and malicious trespass, and a continuing waste of the property of complainants' testator.

The defendant in its answer denied that plaintiff was the owner of the land and alleged that the land in question belonged to the City of Richmond, and sought to justify its acts by setting up a contract with the City of Richmond, whereby it had agreed to dredge what was designated in its answer as the South Channel of the San Pablo Canal to a depth of eight feet below low tide, and to a width of eighty feet on the bottom and one hundred feet on the top, claiming that said so-called South branch of the San Pablo Canal was a natural waterway, and constituted a navigable stream, and that the City of Richmond had the right to make what was called a public improvement thereon. It also set up that it had discontinued the work when served with the order to show cause, and had suffered damage for which it made claim.

The City of Richmond was permitted to intervene

and set up substantially the same issues in its answer to the Bill of Complaint and also in its petition for intervention.

Complainants' answer to the Bill of Intervention of the City of Richmond denied that the City of Richmond had any title to the lands in question, or to the so-called waterway, or that the said so-called waterway constituted a navigable stream, and alleged affirmatively that the City of Richmond by attempting what municipalities so frequently claim to be a public improvement upon the lands of complainants' testator under the guise that it was improving a navigable stream, was really endeavoring to secure for the Standard Oil Company a valuable waterway over, upon and across the lands of plaintiffs' testator from the holdings of the Standard Oil Company to the Bay of San Francisco. Complainants' answer set up also that the City of Richmond and the Standard Oil Company had entered into an agreement whereby the City of Richmond agreed to have deposited upon the lands of the Standard Oil Company the dirt and soil abstracted by the dredger from the slough or so-called South Channel of the San Pablo Canal running through the lands of plaintiffs' testator, and that the Standard Oil Company had agreed to pay to the City of Richmond the sum of 10.74 cents per cubic yard, that being the exact price that the City of Richmond had agreed to pay the North American Dredging Company for dredging the said slough, whereby the Standard Oil Company would secure the dirt or soil of plaintiffs' testator for the cost of dredging;

the City of Richmond would thereby obtain for the Standard Oil Company, under the guise of a so-called public improvement, a valuable waterway over, upon and through the lands of plaintiffs' testator.

It was also alleged in the answer of plaintiffs to the Bill of Intervention of the City of Richmond that the City of Richmond proposed to use the said slough, when dredged, for the purpose of converting it into an open public sewer by leading the sewers from Castro street through the property of the Standard Oil Company and dumping the sewage in the said slough, when dredged. At the trial, however, this point was not pressed, and evidence was not introduced upon the question.

Judgment went for plaintiff, and an interlocutory decree enjoining and restraining defendants was made and issued. No motion for a new trial was made by defendants, and they have appealed from said interlocutory decree to this Court.

ARGUMENT.

Before proceeding to discuss the issues raised in this case, the Court's attention is called to the fact that at least three of the assignments of error filed by appellants on appeal do not comply with Rule 11 of this Court, in that they do not "set out separately and particularly each error asserted and intended to be urged."

The said assignments are as follows: (p. 108, Transcript of Record):

1. "In adjudging and decreeing that defendant and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs, and described in the amended Bill of Complaint of plaintiffs herein."

This it is respectfully submitted is too general, vague and indefinite, and does not amount to a specific statement of error.

It is equivalent to saying that the judgment is against law, and raises all the issues of the case.

In the case of *Doe* v. *Waterman Mining Co., Ninth Circuit, 1895,* reported in *70 Fed. 455,* this Court says, at page 461:

> "There are nine assignments of error in the transcript. In the brief seven additional assignments of error are made. The contention of the appellant is that these additional assignments are only specifications under the first assignment of error. Rule 11 of this Court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the Court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of the Court. The assignment of error in question reads as follows: 'There is error in said decree in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.' This is too general. There is no specification showing wherein the decree is not supported by the evidence."

In the case of *Smith* v. *Hopkins, Seventh Circuit,* found in *120 Fed. 921-923,* the Court says:

> "The first, second and third assignments of error are to the effect that the judgment is contrary to law; that it is contrary to the evidence; that it is contrary to the preponderance of evidence. These assignments are unavailing under the rule, that 'an assignment of errors shall set out separately and particularly each error asserted and intended to be urged.'
>
> "The first assignment does not specify wherein the judgment was contrary to law, nor do the second and third assignments specify—assuming that we may review the evidence—wherein the judgment was contrary to the evidence, or to the preponderance of the evidence.
>
> "The eighth assignment, that the court erred in rendering judgment, is alike unavailing, being too general for review.
>
> " 'The Court erred in entering judgment for plaintiff against the defendant' does not raise a question for consideration of this Court."
>
> *Western Union Telegraph Co.* v. *Wimland* (*Eighth Circuit*), *182 Fed. 193-194.*

See also the concurring opinion of Smith, Circuit Judge, in the case of *Walter Baker & Co.* v. *Gray, 192 Fed.* (*Eighth Circuit*) *921,* found at page 929, wherein the Circuit Judge cites a large number of cases supporting the rule.

The second assignment of error (p. 108, Transcript of Record) is as follows:

> "In ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendants and intervenor be referred to the Master in Chancery to hear testimony as to

> such loss and damage, and to take an accounting thereof, and to report the same, together with his findings thereon, to the Court."

This assignment of error is subject to the same criticism as that of Assignment No. 1, and also to the further criticism that if the decision of the Court in rendering its judgment in favor of complainants and against defendants and enjoining said defendants be correct, the matter of reference to the Master to take testimony follows as a matter of course.

The third assignment (p. 108, Transcript of Record) is as follows:

> "In adjudging that plaintiffs have and recover their costs and disbursements in this suit."

The same criticism applies to this assignment of error as to the two preceding ones, and also it is a question whether this is a matter subject to an assignment of error as costs follow the judgment as an incident, unless otherwise ordered by the trial judge.

The fourth assignment of error is as follows (p. 108, Transcript of Record):

> "In overruling and not sustaining defendant's and intervenor's objection to the admission in evidence of a certain agreement between the City of Richmond, intervenor, and the Standard Oil Company, a corporation, dated March 30th, 1915, wherein the City of Richmond agrees for a consideration of $.1074 a cubic yard to deposit the material dredged from the lands described in plaintiffs' amended Bill on the lands of the Standard Oil Company."

Plaintiffs' answer to the Bill of Intervention of the

City of Richmond affirmatively alleged the existence of such a contract. It was between the Standard Oil Company and the City of Richmond, intervenor herein, which now ranks as one of the defendants in the court below, and appellant here, and was a proper matter to be introduced in evidence. While this assignment of error is not subject to the criticism aimed at Assignments Nos. 1, 2 and 3, still it is submitted the ruling of the court in admitting the contract in evidence was correct.

The fifth assignment of error reads as follows (p. 109, Transcript of Record):

> "In sustaining and not overruling plaintiffs' objection to the following question asked by defendant and intervenor of defendant's and intervenor's witness, H. E. Aine, as follows:
>
> "'Q. Are there any other bulkheads constructed where that dredging material could be placed, so that it could not run back into the channel?'
>
> "Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulkhead behind which said dredging material could be placed."

No criticism is made as to the form of this assignment of error, but no exception to the ruling of the court was noted by the defendants, or either of them, at the trial of the cause.

Appellees claim that of the five assignments of error contained in the record, Nos. 1, 2 and 3 are insufficient under Rule 11 of this Court, and should

be disregarded; that No. 4 is right, and that No. 5 is not supported by the record, and for that reason it is asked that the appeal be affirmed.

Proceeding now to the presentation of the apepal upon its merits, it appears that the pleadings set up the following issues:

I. Title to the property in question described in plaintiffs' amended Bill.

II. Whether the slough running through the lands of plaintiffs' testator described in the amended Bill and designated by the defendants in their answers as the South Channel of the San Pablo Canal is a navigable stream.

III. Whether the dirt or soil underlying the said slough was the property of plaintiffs' testator, and its removal by the defendants constituted waste.

I.

TITLE.

As to the question of the title of the lands in controversy, it seems there should be no dispute.

> "The plaintiffs offered and the Court admitted evidence of plaintiffs' title to the land and property described in the Amended Bill of plaintiffs on file herein and proved their title to the said land described in said Amended Bill of Complaint as set forth in said Amended Bill of Complaint, with the exception of the strip of land about one hundred or two hundred feet wide owned by the Belt Railway Company running across the lands of plaintiffs, and coming out near

> the point marked No. 20 on a map admitted in evidence, and marked Plaintiffs' Exhibit 10" (p. 73 of Transcript, proceedings had before Hon. Wm. C. Van Fleet, Judge).

This, it would seem, would effectually dispose of any claim of the City of Richmond to title to the said property, or to the so-called channel. There was no evidence introduced by the defendants at the trial to controvert the chain of title introduced in evidence by the plaintiffs, and the muniments of title and acts of possession and ownership running through a period since 1871 down to the present time.

Under the case of *Knudson* v. *Kearney, 171 Cal. 250*, it would appear that the title of plaintiffs' testator was vested in him in fee. In that case the Supreme Court of the State of California holds that a grant precisely like the ones by which plaintiffs' testator obtained title to the lands by State patents from the State of California issued to his predecessors in interest is valid and conveys the fee. The opinion is by Shaw, Judge, who wrote the opinion in the case of *People* v. *California Fish Co., 166 Cal. 576,* and he shows that "In the present case the situation is precisely the reverse" of what it was in the so-called San Pedro cases.

In addition to what is here said, it is respectfully urged that even though there was testimony introduced at the trial controverting the claim of title of plaintiffs to the land in question, which there was not, yet the finding of the trial judge should not be disturbed unless error plainly appeared. No such error is shown,

and indeed no attempt is made by appellants to disturb the decision of the trial court in this regard. And it might be added that upon argument in the court below upon written briefs the defendants abandoned any claim of title to the property in question, and presented no argument whatever attempting to controvert the argument of plaintiffs in the court below.

II.

THE SLOUGH IS NOT A NAVIGABLE STREAM.

This question could be disposed of by invoking the rule that the decision and findings of the trial court upon conflicting evidence will not be disturbed by this Court upon appeal.

The court made a personal view of the premises.

> "During the trial of the cause the court by consent and in company of counsel, made a personal view and inspection of the property involved in the cause and of the premises and of the slough marked 'C' in Exhibit 10." (Transcript of Record, p. 106.)

The evidence introduced at the trial of the cause amply sustains the finding and decision of the trial judge that this slough is not a navigable stream. It appears that in 1871 Dr. Tewksbury, the predecessor in interest of plaintiffs' testator, and their grandfather, constructed a dyke or levee along the north side of the lands across the slough near its mouth. Evidences of the dyke are yet visible at the banks of the slough. On the maps introduced in evidence and

marked "Exhibits 10 and 11" the dyke is shown as crossing the slough.

Testimony of John H. Nicholl (pp. 76-79, Transcript of Record).

Antone P. Borbi (pp. 80-81, Transcript of Record) testified that he was the tenant of Dr. Tewksbury from 1873 down to the time of Dr. Tewksbury's death, and afterwards of Dr. Tewksbury's widow, Mrs. Emily S. Tewksbury, down to the year 1901. That the dyke ran across slough marked "C," and was kept in repair by him for nearly thirty years, and that he pastured cattle upon the land every year from June until October.

This testimony is sustained by that of Benjamin Boorman as to the dyke in question, and the pasturage of cattle. (Pp. 81-82, Transcript of Record.)

Appellants rely upon the testimony of Col. Rees, United States Engineer in charge for the War Department of the United States Government, but the fact is Col. Rees never saw the slough in question until December 8, 1915, when he took his launch "Suisun" up the channel to the Standard Oil Company's works. This was after the dredging had been done at the southern end of the slough, but the gallant Colonel admitted that he went up the slough upon the flood time, and remained there only fifteen minutes, and went out upon the flood tide.

When Capt. Anderson took his dredger up the slough in April, 1915, he went up on the flood tide. He stopped about four hundred feet from the Standard Oil dyke and at low tide his dredger, which drew

four and one-half feet, rested on the bottom of the slough. The water there was less than two feet at low tide. The cross section maps of the engineer of the City of Richmond showed that at low tide the south end of the slough at that point is high and dry. All of these so-called acts of navigation amount to nothing.

Capt. Kleesow rowed a hunting boat in 1880 or 1882 for a distance of three miles up the slough. The slough is less than one mile long. He testified that he saw no dyke.

Judge Lindsay rowed and sailed his boat and hunted and fished over the marsh for twenty years.

Mr. Aine, assistant mechanical engineer for the Standard Oil Company, towed several loads of piles up the slough in 1907. He used a light draught launch, and went in and out on the flood tide. The next use of the slough was in March, 1914, when he piloted a launch towing a barge. Two days later he piloted Petroleum No. 3, a light draught stern-wheeler. Both the launch towing the barge and Petroleum No. 3 went in and out on the flood tide. These are not acts of navigation. These vessels were not engaged in commerce. They merely went up there in order to make evidence, so as to ask Col. Rees for his permit to improve a navigable stream. This permit of the War Department simply says we have no interest in this matter, and you can go ahead so far as the War Department is concerned. It is not the act of the War Department, which decides that it is necessary that the stream be improved for purposes

of the government. It confers no authority upon the City of Richmond to perform this dredging and so-called public improvement. And it is submitted that this showing fails to meet the legal requirements of a navigable stream. Mere depth of water is not sufficient to render a stream navigable in law, and in this case sufficient depth of water has not been shown save for launches, scows and barges, and then only at high tide.

No bona fide user of the stream for purposes of navigation and commerce has been shown; and, indeed, the evidence shows that such use is impossible. In addition, no means of access of the public to the slough exists. The head of the slough is at least one-fourth of a mile from the north end of Standard avenue. It is true the Standard Oil Company has cut a canal on its property to connect with the slough, but the public have no rights on their canal, as it terminates one hundred feet east of Standard avenue.

But the slough, if navigable, must be navigable in its natural state, and not by the aid of artificial means.

On what constitutes navigability in law the following authorities are cited:

In Kinney on Irrigation and Water Rights, 1912 Edition, under the heading Navigable Stream, Vol. 1, page 563, the learned jurist says:

> "It has been settled by a long line of decisions that the navigable waters of the United States are those which are actually navigable in fact and which by themselves or their connections with other waters for a period long enough to be of commercial value are of sufficient capacity to

float water craft for the purposes of commerce, trade, transportation, or even pleasure, between this country and foreign countries, or between the states of this country, or between different points in the same state.

"To be navigable, a water course must have a useful capacity as a public highway for transportation." (P. 566.)

"In order to be a public body of water, it must be accessible to the public, and have a terminus by which the public can enter it and another from which they can leave it. Hence, creeks which open in navigable waters, but merely lead into private lands are not public navigable waters." (P. 567.)

"A stream which can only be made navigable or floatable by artificial means is not a public highway." (P. 570.)

"To meet the test of navigability as understood in the American law, a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state, and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable, is not sufficient. * * * Mere depth of water, without profitable utility will not render a watercourse navigable in the legal sense so as to subject it to public servitude. * * * To be navigable a watercourse must have a useful capacity as a public highway of transportation."

Harrison v. *Fite,* 148 Fed. 781-3.

In *Chisholm* v. *Caines, 67 Fed. 285,* Simonton, Circuit Judge, at page 292, asks:

> "What is the essential characteristic of a public navigable stream? Not the bare fact that the tide ebbs and flows therein (citing cases). Nor does the answer to this question depend upon its depth, nor upon its width. * * * On the other hand neither its depth nor width nor uninterrupted course, nor freedom from obstruction, nor constant supply of water, nor an unvarying floatable condition, nor all combined would in themselves make it navigable water. Else a pond or lake within the domain of a citizen surrounded on all sides by his land, would be a navigable water. It is evident that to make a body of water a public navigable stream, it must be accessible to the public. The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway—a means open to the public of passing from one place where they have a right to be, to another, in which they have the same right."

The term navigable waters of the United States has reference to commerce of a substantial and permanent character to be conducted thereon.

Leovy v. *U. S.*, 177 U. S. 621-8.

In this case Mr. Justice Shiras, Judge, at page 628, reviews the cases "from which may be derived a definition of navigable waters."

In *Rose* v. *The Granite Bridge Corp., 21 Pick. 344,* Shaw, C. J., says at page 347:

> "It is not every ditch in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it

every small creek, in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture."

Where a river is not navigable in its natural condition the State may not make it navigable by artificial means.

People v. *Economy L. & P. Co.,* 89 N. E. (Ill.) 760-8.

To be navigable in law it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce. Lurton, J., in

Toledo Liberal S. Club v. *Eric S. Club,* 90 Fed. 680-2.

A stream in which the tide ebbs and flows and in which small boats and tugs have gone up and down during high tide is not navigable.

Wilson v. *Prickett,* 139 Pac. 754-5 (Wash.)

"To hold that the State can by artificial means make a stream navigable which in a state of nature was not navigable and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to hold that private property may be taken or damaged for public use without compensation."

People v. *Economy Light & Power Co.*, 89 N. E. (Ill.) 760-768.

Viewing the evidence in the light of the foregoing, it is manifest that the defendants have failed to prove that this slough is a navigable stream.

The City of Richmond has no authority to cause this so-called public improvement. No authority for it to enter into the contract with the defendant exists. The permit from Col. Rees for the War Department of the United States amounts to no more than saying there is no objection on our part. The United States does not ask that the work be done. Congress has not ordered it. The Secretary of War has not ordered it. Neither has the State of California ordered that the work be done. Nor has the State authorized the City of Richmond to do the work.

The Charter of the City of Richmond, found in Statutes of California 1909, page 1264, under Article II, headed "Powers," subdivision 10, is as follows:

> "To control the bays, inlets and channels flowing through the City or adjoining the same; to widen, straighten and deepen the same where such work is necessary for the purpose of sanitation, drainage or removal of sewage; to fill the same when they are obstructions to proposed streets or roads; to control and improve the water front of the City, and to maintain embankments and other works necessary to protect the City from overflow; to construct and maintain wharves, chutes and breakwaters within the limits of the city."

No proceedings to acquire jurisdiction to order the work done were had. It is doubtful if there is any

authority by which the city could lawfully order this work done. But it suffices to say that no order was made.

Without attempting to review all of the cases cited by appellants in their brief, attention is called to the following:

The case of *Kamm* v. *Normand,* reported in *126 Am. St. Rep. 692,* is a logging stream case from Oregon. The plaintiff was the owner of land situated on a creek down which the defendants were floating logs to market. In order to do this the defendants had built a splash dam, and used the head of water impounded by it to drive the logs down the stream. The action was one for an injunction to prevent their use of the stream in that manner. At the trial defendants prevailed. On appeal the judgment was reversed. What there is in this case amounts to authority for the appellees here, but the interesting part of it is the quotation by the Court from a former decision by the Court relating to the same stream found on page 702 of the report:

> "Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated as to have such length and capacity as to enable it to accommodate the public generally as a means of transportation."

In the case at bar the slough in question is less than one mile in length, and passes through the lands of plaintiffs. Nothing is produced along its banks, no logs or lumber to be floated down its stream, or agricultural products to be sent to market over it; no manufactured products, save perhaps that of the Standard Oil Company alone. Added to that there is no access to the slough by the public. The claim of defendant and intervenor that because the Richmond Belt Railway Company owns a strip of land one hundred and ninety-eight feet in width across or over the southern end of the slough, the public has access to the slough is ridiculous. There are no improvements upon said strip of land. It is merely a right of way, and so far as the public is concerned is private property, and the public has no right thereto. The public generally is not interested, and the slough has neither length nor capacity to enable it to accommodate the public for the purpose of navigation and commerce.

The quotation from *"The Montello," 20 Wall. 430,* found in appellants' brief, combines the language used by Mr. Justice Davis, winding up with the quotation of the Justice from the language used by Chief Justice Shaw in the case of *Rowe* v. *Granite Bridge Corporation, 21 Pick. 324.* This case of "The Montello" was one where the government of the United States had libeled the steamer "The Montello" for non-compliance with certain acts of Congress as to enrollment, license, etc., of all vessels of a certain tonnage navigating the navigable waters of the United States. The

defendants in that case had denied that Fox River upon which the vessel was plying was a navigable stream. There is no point of similitude between the Fox River in Wisconsin and the slough involved in this case in Contra Costa County, California. The Fox River had been improved at great expense to render it navigable by a private corporation, and tolls were charged the vessels for navigating it. A large commerce from early days had used the stream. After these improvements by the private corporation, the United States took charge of the stream, bought out the corporation, and reduced the tolls. Therefore general language like that quoted in appellants' brief is of no value in deciding the case where the facts are entirely dissimilar.

Appellants seem to rely very much upon the decision of Chief Justice Beatty of the Supreme Court of the State of California, found in the *City of Oakland* v. *Oakland Waterfront Company, 118 Cal. 160.* At page 182 at the outset of his decision, Mr. Chief Justice Beatty stated:

> "This is an action to determine conflicting claims to real estate."

The question in that case was the consideration of the terms of the grant to the Town of Oakland by the State Legislature, and involved the ownership of the waterfront by the City of Oakland, and the Court found it necessary to locate the "ship channel," used by the Legislature as one of the calls of the grant. No question regarding a navigable stream is raised in this

case, and it is useless for counsel on the other side to contend that it does.

The next two cases cited in appellants' brief come from the State of Washington.

In *Judson* v. *Tidewater Lumber Company, 98 Pac. 377,* the portion quoted in their brief is taken from the headnote. That was an action for damages occasioned by the alleged wrongful obstruction of a portion of the channel of the Puyallup River. The parties were riparian proprietors. What is said about navigability of the stream appears at page 379, at the middle of the second column. It may be assumed that there was no real question as to whether or not the Puyallup River was a navigable stream. Certainly nothing in the case cited sheds any light upon the case at bar.

In the other case, *Dawson* v. *McMillan, 75 Pac. 807,* the portion quoted is also taken from the headnote. Presumably because the word "slough" is used in the headnote, counsel on the other side deemed it was a valuable case, but an examination shows that it is of very little value. It was an action to restrain certain acts of obstruction in the branch of the sea known as "McElroy's Slough." An injunction was granted, but on appeal no question was made upon the findings. It follows that it was determined by the findings that this slough was navigable. There was nothing for the Court upon appeal to decide, there being no attack made on the findings.

Appellant's argument that the State has no power to alienate lands underlying any navigable stream or

body of water so as to cut off the public right of navigation has no place here in view of the decision of the Supreme Court of California in the case of *Knudson* v. *Kearney, supra,* which squarely holds that the State's patent in a precisely similar patent to the ones from which plaintiffs' testator deraigned title conveyed the land in fee.

So also is their discussion of the question of *jus publicum* and *jus privatum* entirely out of place here. This is not a proceeding by the Attorney-General of the State to have a State patent cancelled. If it were, possibly the doctrine might be invoked.

But in this case the doctrine has no justification for the invasion of plaintiff's property by a municipality under guise of public improvement.

Nor need plaintiffs prove improvements to the waterway done or made by them. The question here is, Is the slough a navigable stream? The trial court, after full hearing and personal view and inspection, has decided that the slough is not navigable in law.

Without attempting to review the remaining numerous cases cited by appellants in their brief, it is respectfully maintained that the decision of Judge Van Fleet, after an inspection and view of the premises, and upon testimony taken at the trial, is correct, and should be sustained, and furthermore, that the rule as to the finding of the trial court upon conflicting evidence should be sustained.

III.

THE REMOVAL OF THE DIRT AND SOIL BY DREDGING THE SLOUGH RUNNING THROUGH PLAINTIFFS' LAND AMOUNTED TO A CONTINUING TRESPASS AND CONTINUING WASTE UPON THE PROPERTY OF PLAINTIFFS.

The property described in plaintiffs' amended Bill, comprising about five hundred acres of land, and being owned by the plaintiffs' testator in fee at the time of his death, and his being seized and possessed, and exercising acts of ownership over and upon said property, and the said slough running wholly through the lands of plaintiffs' testator, and his predecessors in interest, and the same having been conveyed to his predecessors in interest by State patent without any delineation of said slough, it follows that the title to the bed of the slough vested in fee in the plaintiffs' testator irrespective of the question whether said slough was a navigable stream or not, and the removal of the soil or dirt by dredging said slough and depositing the same upon the lands of the Standard Oil Company amounted to a continuing trespass and continuing waste of the property of plaintiffs' testator.

It is respectfully submitted that upon the three questions, title to the land, navigable stream, property in the dirt or soil underlying the slough, or so-called navigable stream, were all correctly and properly

decided in favor of plaintiffs in the court below by the trial judge, and the decision of the trial judge ought to be sustained.

All of which is respectfully submitted.

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W. P. JOHNSON,

Attorneys for Appellees.